SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1011

ARMORED CARRIER CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

B.D.C. CORPORATION,
Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The written opinion of the District Court (Majority opinion, App. A, *infra,* p. 11, ff.) Dissenting opinion App. A-1, pp. 22ff., 260 Fed. Supp. 612) is reported.

Jurisdiction

The judgment of the District Court dismissing the complaint (App. B, *infra,* p. 33) was entered on October 3,

1966. Armored Carrier Corporation filed a Notice of Appeal to this Court on November 30, 1966. The jurisdiction of this Court rests on 28 U.S.C. Section 1253.

Question Presented

Where evidence before the Interstate Commerce Commission (I.C.C.) in a proceeding on an application for a certificate of public convenience and necessity demonstrates a continuing series of violations by the applicant of the Interstate Commerce Act (for one group of which the applicant was indicted and convicted) and perjurious denials by the applicant of such acts, must the I.C.C. in granting a certificate make and report findings as to (a) whether such acts were willful and, (b) the effect of such acts on applicant's fitness?

Is the I.C.C.'s ultimate finding that intervenor B.D.C. Corporation is fit and should be granted a certificate of convenience and necessity supported by basic findings in the record?

Is the I.C.C.'s ultimate finding that intervenor B.D.C. Corporation is fit and should be granted a certificate of convenience and necessity supported by substantial evidence in the record?

Statute Involved

The pertinent portion of 49 U.S.C.A. Section 307(a) is printed in App. C. *infra*, p. 33.

Statement

The appellant, Armored Carrier Corporation (hereinafter referred to as Armored), is a New York corporation. The defendant, B.D.C. corporation (hereinafter referred

to as B.D.C.), is an Illinois corporation wholly owned by Bankers Dispatch Corporation of Delaware. Bankers Transport Corporation of Wisconsin is also wholly owned by Bankers Dispatch Corporation of Delaware. The three corporations have officers and some directors in common.

Armored holds intrastate authority to transport cancelled checks (known as cash letters) in Wisconsin since August 18, 1953, and has been engaged in intrastate operations in Wisconsin since December of 1961. Armored has interstate authority under Docket No. MC-12750, Sub. 105 TA, between Chicago, Illinois, and Wisconsin, and has engaged in interstate transportation of cash letters as a contract carrier for banks between Chicago, Illinois, and Counties in Wisconsin, excluding the five counties of Walworth, Jefferson, Dodge, Columbia and Kenosha, except for eight specific towns in four of the five Wisconsin Counties since January 1962. Armored initially filed for interstate authority between Chicago, Illinois, and Counties in Wisconsin, including the above-named five counties on November 11, 1961.

B.D.C. holds intrastate authority in the State of Wisconsin since May 14, 1957, to transport cash letters for the First National Bank of Kenosha and the First National Bank of Milwaukee only. The intrastate authority was granted to Bankers Transport Corporation of Wisconsin and subsequently transferred to B.D.C. Additional intrastate authority was denied B.D.C. by the Wisconsin Public Service Commission by its order of April 25, 1962.

B.D.C. obtained interstate authority between Chicago, Illinois, and some fifteen counties in Wisconsin, excluding the five counties of Walworth, Jefferson, Dodge, Columbia and Kenosha, under Docket No. MC-114533, in April of 1957. B.D.C. filed for emergency, temporary authority to transport cash letters between Chicago, Illinois, and the

above-named five counties, on December 1, 1961. This authority was granted on December 4, 1961, under Docket No. MC-114533 R-6, and became effective December 6, 1961. B.D.C. filed for a temporary authority between Chicago, Illinois, and the above-named five counties on December 1, 1961, and this authority was granted on January 2, 1962, under Docket No. MC-114533, Sub. 34TA, and became effective January 5, 1962. The tariffs making the authority effective were filed and accepted by the Commission on January 26, 1962. B.D.C. filed for permanent authority on December 1, 1962, under Docket No. MC-114533, Sub. 32.

Armored opposed B.D.C.'s application for permanent authority, which was heard in Chicago, Illinois, before a Joint Board, of members from the States of Illinois and Wisconsin on March 13, 1962, and August 1 and August 2, 1962. The Joint Board failed to agree upon a recommendation and pursuant to Section 205(6) of the Interstate Commerce Act (hereinafter referred to as Act), the proceeding was referred to Examiner Leonard J. Hasson, Jr. On August 24, 1964, Examiner Hasson by his report, denied this application (App. D, pp. 34ff.).

Armored initiated a complaint proceeding under Docket No. MC-C-3480 on November 27, 1961, in which plaintiff alleged that B.D.C. knowingly and willfully conducted unauthorized operations in interstate commerce as a carrier in the transportation of cash letters between Chicago, Illinois, on the one hand, and on the other, points in the five Wisconsin Counties above-named, all in violation of the Act, and that such unauthorized operations proved detrimental to the motor carrier business of the plaintiff. The complaint was heard and the hearings were held in Chicago, Illinois, on April 30, 1962, and on January 29

and January 30, 1963, before Joint Board No. 13 of the Commission. The members of said Board were unable to agree upon a recommendation and the proceeding was referred to Examiner William J. Cave for a report and recommended order. Examiner Cave found that B.D.C. had willfully violated Sections 203 and 206 of the Act (App. E, pp. 51ff.). It was Examiner Cave's opinion that since at the time of the hearing, B.D.C. held temporary authority, the relief sought in the complaint that B.D.C. be refused temporary or emergency authority was moot. He recommended that the complaint be dismissed.

The record of the application proceeding and the record of the complaint proceeding were by stipulation incorporated into the complaint proceeding. The transcripts of the Wisconsin Public Service Commission proceedings were marked in evidence in the application proceeding.

Exceptions were taken from the respective reports of Examiners Hasson and Cave and both the application proceeding and the complaint proceeding were submitted on a consolidated record to Division I of the Interstate Commerce Commission (hereinafter referred to as the Commission). The majority opinion was by Commissioners Brown and Bush. Commissioner Murphy dissented with a separate opinion (App. F, pp. 69, 70).

The order of the Commission, dated June 30, 1965, and served July 12, 1965, dismissed the complaint proceeding and granted the application for permanent authority with the requirement that the applicant file certain tariffs pursuant to Sections 215-217 and 221(c) of the Act within 90 days after the date of service.

On August 9, 1965, Armored filed a petition for reconsideration of the order served July 12, 1965, pursuant to Rule 101 of the General Rules of Practice of the Commission. By its order dated September 23, 1965, Division I,

acting as an Appellate Division denied such petition. On October 14, 1965, pursuant to Rule 101(a), (4) of the General Rules of Practice of the Commission, Armored filed a petition seeking a finding that an issue of general transportation importance was involved in the order served July 12, 1965. This petition was thereafter denied by the Commission on November 5, 1965.

The within action was commenced by order to show cause, dated December 30, 1965. The prayer for relief requested that the order of July 12, 1965, issued upon application No. MC-114533 (Sub. 32) and complaint proceeding No. MC-C3480 be vacated and set aside; and that that a preliminary and permanent injunction be issued against the operation, enforcement and execution of both of such orders.

On January 12, 1966, the Commission served an order granting B.D.C. permanent authority under Docket No. MC-114533 (Sub. 32) for commercial papers, documents and written instruments between Chicago, Illinois, on the one hand, and on the other, points in Walworth, Jefferson, Dodge, Columbia and Kenosha Counties, Wisconsin.

On October 3, 1966, the District Court entered judgment dismissing the complaint in the injunction action. That judgment is the subject of this appeal.

The Question Is Substantial

What is involved here is the underlying question as to the obligation of an administrative tribunal to make findings as to the effect of willful and knowing violations on the character of an applicant's fitness. This question permeates all administrative decisions wherein the enabling statute, such as here, requires a finding as to the applicant's fitness.

The failure of Division 1 of the Commission to make such findings was the kernel of Judge Bartels' dissenting opinion:

> "If we dissect the Commission's judgment into its component parts, we discover that the necessary component of *subsidiary findings, is missing* and that the Commission *abdicated its obligation* in this respect and thus short-circuited the administrative process" (App. A-1, page 27). (Emphasis supplied.)
>
> "In order that the Court may adequately review the validity of the Commission's conclusion, it is necessary that the Court *comprehend the basis* for this finding of fitness. This is not possible without *supporting statements* explaining whether the unauthorized acts were willful or negligent transactions and, in either event, to what extent if any, such finding or findings affect the conclusion" (App. A-1, page 29). (Emphasis supplied.)
>
> "Speculation as to the basis of the Commission's determination of fitness is insufficient to enable a review of its conclusion" (App. A-1, page 31).

The requirement of basic findings to support a conclusion of fitness (*United States* v. *Pierce Auto Freight Lines*, 1946, 327 U. S. 512, 66 S. Ct. 686) is now in need of further definition with respect to the specific obligation to make findings as to the effect of willful and knowing violations upon the character of the applicant when passing upon its fitness.

> "To approve a holding by the Commission without *supporting findings* that such an applicant is fit to perform an important public service despite four years of unauthorized operations, plus other derelictions as earlier set forth, promotes in my opinion a dangerous precedent" (App. A-1, page 26). (Emphasis supplied.)

Commissioner Murphy's dissent highlighted the inadequacy of the majority's findings:

> "Neither the fact that temporary authority was issued allowing the applicant to continue these operations pending disposition of these proceedings nor the desire of shippers for continuance of this service *relieves us of the responsibility of determining applicant's fitness*" (App. F, page 69). (Emphasis supplied.)

The District Court majority decision recognized the confusion created by the Commission's decision:

> "A question exists, due to the language used in the report, as to whether the continued unauthorized operations during the four-year period, 1957-1961, were 'willfully performed' or continued to be inadvertent and in good faith." • • • "For the purposes of this issue, we consider that the Commission found the operations to be inadvertently begun, but knowing and willfully continued" (App. A, page 13).

The dissenting opinion also commented on the Commission's failure to make and report findings on the character of the violations:

> "In the past when unauthorized acts were involved, the Commission predicated its determination of the question of fitness upon whether the unauthorized transactions were willful or non-willful,[5] but in the instant case it has chosen to *avoid* this issue" (Citing cases) (App. A-1, page 31). (Emphasis supplied.)

The Commission's failure to make any evaluation as to the effect of the continued knowing and willful violations on B.D.C.'s fitness has been the hallmark of this decision

from its inception. Without these findings, the Court has been deprived of a basis on which to determine the propriety of the decision.

The Commission had before it an extensively documented record, including transcripts of hearings and exhibits with respect to both the application and complaint proceedings. These records and exhibits demonstrated that B.D.C. was found by the hearing examiners to have engaged in knowing and willful continued violations of the Act (App. D, page 48) (App. E, page 56).

Despite this tremendous fund of information documenting a host of unlawful activity, the Commission failed to make a statement as to the effect of the knowing and willful continued violations on the character of the applicant's fitness. Their decision is devoid of discussion or evaluation of what effect these violations had on the Commission's determination on the question of fitness. This is the precise failure of the decision. The most essential element in the determination of the applicant's fitness was omitted.

It is of vital importance to the review of administrative determinations in every field where the enabling statute requires a finding as to the applicant's fitness, that this Court enunciate the rule with respect to the obligation of an administrative tribunal to make and report specific findings as to the effect upon the applicant's fitness of willful violations of the statute under which authority is sought.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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Of Counsel.

January 27, 1967.

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 65-C-1298

[SAME TITLE]

September 28, 1966

Appearances:

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Before—Honorable LEONARD P. MOORE, U.S.C.J.,
Honorable JOHN R. BARTELS, U.S.D.J.
Honorable JACOB MISHLER, U.S.D.J.

MISHLER—D.J.

This action instituted pursuant to 28 U.S.C. §§2321-2325 seeks to vacate and set aside an order of the Interstate Commerce Commission dated June 30, 1965 (served July 14, 1965), in which it

1. Dismissed the complaint of the plaintiff (No. MC-C-3480),

2. Granted the application of B.D.C. Corporation (B.D.C.) the Intervenor, for a certificate of public convenience and necessity permitting the operation by B.D.C. as a common carrier of commercial paper, documents, and written instruments used in the conduct and operation of banks and banking institutions between Chicago, Illinois and points in five Wisconsin counties [No. MC-114533 (sub. No. 32)].

The complaint proceeding was initiated by the plaintiff on November 27, 1961, and charged B.D.C. with knowingly and willfully conducting unauthorized operations in interstate commerce between Chicago and the five Wisconsin counties. On December 1, 1961, B.D.C. applied for a certificate of public convenience and necessity between Chicago and the aforementioned five counties, and for temporary authority pending the determination. Emergency temporary authority was granted December 6, 1961, and temporary authority on January 2, 1962.

B.D.C. had received authority to transport cash letters between Chicago and 15 counties in Wisconsin in an I.C.C. certificate issued April 4, 1957. The five counties in question lay between Chicago and the 15 counties that B.D.C. was authorized to service.

The report of June 30, 1965 discusses the manner of B.D.C.'s operation, the need of the so-called "country banks" of the service offered and the sufficiency and efficiency of B.D.C.'s facilities, equipment and manner of operation. The report discusses 4½ years of unauthorized service to the five counties beginning in 1957. It found the unauthorized operations were inadvertently begun.[1] The report (p. 131) found "the evidence [of past unauthorized operations] does not require a finding of unfitness." It further found,

> "• • • that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act, and the rules and regulations of the Commission thereunder • • •."

I.

B.D.C.'s Unauthorized Operations for Four Years Prior to Filing of the Complaint.

The Interstate Commerce Commission (I.C.C.), Division I, found that the operations in question "were inadvertently begun." A question exists, due to the language used in the report, as to whether the continued unauthorized operations during the four-year period, 1957-1961, were

1. When B.D.C. instituted operations under its new certificate in May 1957 it also instituted operations between Chicago and points in Kenosha County and, in addition, Walworth, Jefferson, Dodge, and Columbia Counties. The last four were counties which were not named in the 1956 application. These five counties are in B.D.C.'s line of haul between Chicago and the other 15 counties. B.D.C. thought it had been granted authority to serve these along with the other 15 counties. Because of this and the inexperience of its management these operations were inadvertently begun.

"willfully performed" or continued to be inadvertent and in good faith. If the latter is the fact, such operations, albeit unauthorized, would be no bar to a grant of authority. See *Interstate Common Carrier Council* v. *United States*, 1949, D. Md., 84 F. Supp. 414, aff'd mem., 338 U. S. 843, 70 S. Ct. 91 (per curiam). For the purposes of this issue, we consider that the Commission found the operations to be inadvertently begun but knowingly and willfully continued.

No case has been called to the Court's attention that declares that the knowing and willful performance of unauthorized operations is, as a matter of law, a bar to a grant of authority. Absent pertinent authority, and since the Commission is the expert in the field of transportation, *East Texas Motor Freight Lines, Inc.* v. *Frozen Foods Express*, 1956, 351 U. S. 49, 76 S. Ct. 574, its views should be entitled to special consideration. *I.C.C.* v. *Nelson Coop. Marketing Ass'n*, 1962, W.D. Okla., 209 F. Supp. 697, 701. The Commission's view appears clear—past knowing willful conduct in violation of the Act and the rules and regulations thereto, is an element to be considered in the determination of present and future fitness. Thus, in *McLaughlin Common Carrier Application*, 73 M.C.C. 318, the I.C.C. stated: "• • • applicant's past record leaves a great deal to be desired • • • [but] the record established • • • applicant's resolve in the future to live within the letter and the spirit of the law." *Antietam Transit Co., Inc. Common Carrier Application*, 84 M.C.C. 459 is not to the contrary. There the Commission found not only that *Antietam* performed prior willful unauthorized operations, but further that "its unauthorized operations were continued, even after the hearing in the instant application was held • • •."

The corporation is a form of business enterprise in which change of management and improvement in systems and controls may result in a radical change in the corporate capability to perform its operations. It would appear impractical and unrealistic to conclude that the I.C.C. lacks discretionary authority to determine whether a corporation is presently "fit" to perform its proffered services. The argument that past willful violations should, per se, bar a grant of authority in the present and for the future is one that looks backward and appears transfixed. Examination of the past should only be useful in assessing the prospective conduct of the applicant. Such assessment is one peculiarly within the expertise of the I.C.C. and should not be interfered with unless found to be arbitrary and capricious.

Accordingly, we find that past willful misconduct is not, as a matter of law, sufficient to bar a grant of authority. Rather, the I.C.C. is to consider such willful misconduct as an element in assessing the applicant's present and prospective "fitness" within the Act.

II.

The Commission's Failure to Make a Specific Finding on the Issue of "Willfulness".

Section 14(1) of Title 49, U.S.C. provides:

> Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made.

Under this section and section 8(b) of the Administrative Procedure Act [5 U.S.C. §1007(b)], the Commission must make a written report setting out its findings, conclusions and decisions, together with its reasons therefor. It is, however, not required to make the detailed findings of fact required by Rule 52(a) of the Federal Rules of Civil Procedure. See *Chicago & E.I.R.R* v. *United States,* 1952, S.D. Ind., 107 F. Supp. 118, aff'd mem. 1953, 334 U. S. 917, 73 S. Ct. 346 (per curiam). Thus, if the report contains subsidiary findings of fact sufficient to lend adequate and rational support to the order, the Court must uphold the Commission's conclusions. *Alabama Great So. R.R.* v. *United States,* 1951, 340 U. S. 216, 71 S. Ct. 264; see *United States* v. *Pierce Auto Freight Lines, Inc.,* 1946, 327 U. S. 515, 66 S. Ct. 687; *Florida* v. *United States,* 1931, 282 U. S. 194, 51 S. Ct. 119.

The Commission made the following subsidiary findings of fact relevant to the ultimate determination of "fitness":

(1) That the unauthorized operations were inadvertently commenced:

(2) That the unauthorized operations performed in the five counties in question were in B.D.C.'s direct line of haul between Chicago and the fifteen counties in which it was authorized to operate since 1956;

(3) That B.D.C. initially thought that it had been granted authority to serve the five counties in question along with the other fifteen counties;

(4) That one of the five counties in question, i.e., Kenosha, was named in B.D.C.'s 1956 application and, for an unexplained reason, excluded from the grant of authority therein;

(5) That B.D.C. is financially fit to conduct operations in the five counties in question;

(6) That B.D.C. carries adequate insurance, including reconstruction insurance;

(7) That B.D.C. furnishes vaults to its customers;

(8) That B.D.C. operates on a regular daily schedule, six days per week; and

(9) That the supporting shippers find B.D.C.'s services satisfactory and desire their continuance.

The Commission did not make specific subsidiary findings in respect of the issue of willfulness. Plaintiff argues that since it had raised that issue before the Commission and that since the alleged willfulness of B.D.C.'s misconduct forms the basis for its complaint, the Commission must make specific subsidiary findings on that issue; plaintiff concludes that absent such finding the Commission's report cannot lend adequate support to its Order. To compliment this argument, plaintiff also contends that absent such a finding a reviewing court would be unable to comprehend the basis for the Commission's ultimate determination.

In *Southern Kan. Greyhound Lines, Inc.* v. *United States,* 1955, W.D. Mo., 134 F. Supp. 502, aff'd mem., 1956, 351 U. S. 921, 76 S. Ct. 779 (per curiam) plaintiff argued:

> • • • though the Commission's report took notice of their contentions that they are operating on such a close margin that they cannot stand any diversion of traffic without deterioration in the standards of their service, and that the proposed new service by Trails would result in a competitive situation destructive to them and their service, it did not make a specific subordinate finding upon that issue, • • •

> but made only the ultimate finding that the proposed service 'is or will be required by the present or future public convenience and necessity', and that, therefore, the findings are not sufficient to support the orders.

In ruling against plaintiff Judge (later Justice) Whittaker placed great emphasis on *Luckenbach S.S. Co.* v. *United States,* 1954, S.D.N.Y., 122 F. Supp. 824, aff'd mem., 347 U. S. 984, 74 S. Ct. 850 (per curiam). There, Judge Augustus N. Hand held that the I.C.C. had considered the issues raised and that specific findings thereon were unnecessary. He stated:

> "It is only necessary that the essential basis of the Commission's order appear in the report so that a court can satisfy itself that the Commission has performed its function";

and concluded:

> "• • • Thus, where the issue raised does not seem of manifest importance and the Commission had indicated that it has considered it, we do not think it wise or necessary to protract the litigation further by remanding the order for more explicit and seemingly useless discussion."

Luckenbach is not in conflict with *United States* v. *Pierce Auto Freight Lines. Inc., supra,* since there the Court found that the Commission had failed to consider the subordinate issues raised.

The report clearly demonstrates the attention and consideration given by the I.C.C. to plaintiff's claim that the unauthorized operations were "knowingly and willfully performed." The Commission expressly refers to the fact that the examiner in the complaint proceeding "found

that B.D.C. had willfully performed the considered operations without authority." And the dissenting opinion declares that the "unlawful operations [of B.D.C.] • • • can only be viewed as knowing and willful violations of the act." Furthermore, the Commission in its discussion of "fitness" concluded "that the evidence as to those operations does not require a finding of unfitness." In so doing, it must have placed some emphasis on subordinate findings numbered one through four above, all of which are relevant to the issue of willfulness. Furthermore, implicit in such conclusion is the subsidiary finding either (1) that the operations continued to be conducted inadvertently and in good faith or (2) that the operations in question were "knowingly and willfully" continued but that such willful misconduct was not sufficient, considering all other relevant findings, to bar a grant of authority.

Since it is clear that the I.C.C. gave adequate consideration to the subsidiary issue of willfulness, the only issue remaining is whether the issue of "willfulness" is of such "manifest importance" in the instant case that a specific subordinate finding thereon must be made.

We think not.

In the instant case, it is irrelevant which of the alternative findings the Commission made, since the findings in the report clearly show that the ultimate finding that the "applicant is fit, willing and able properly to perform such service" would remain the same. The specific subordinate findings in the report are sufficient to lend adequate and rational support to the order; the Court must uphold the Commission's conclusions.

To remand this case would be useless. As the Court stated in *Kweskin* v. *Finkelstein*, 1955, 7th Cir., 223 F. 2d 677:

> We are reluctant to remand this or any other case in order to have the proper findings entered. We realize that such a remand will involve a delay and additional expense for each of the parties. Under Title 28 U.S.C.A. §2106 we have the authority to • • • and we might consider the failure to make adequate findings of fact as non-reversible error if we can ascertain from the record that one party or the other is clearly entitled to judgment in his favor.

This statement and that of Judge Hand are apparently outgrowths of that line of decisions that holds that an appellate court must affirm a decision of a trial court if it is correct, and even though the latter relied upon a wrong ground or gave a wrong reason for its decision, *Yemish* v. *Barber*, 1956, 9th Cir., 232 F. 2d 939; the decision must be affirmed on any grounds that find support in the record. *Jaffke* v. *Dunham*, 1957, 352 U. S. 280, 77 S. Ct. 307; *United States* v. *Rose*, 1965, 3d Cir., 346 F. 2d 985.

III.

Commission's Findings Supported by Substantial Evidence.

In considering this issue it is elementary that the reviewing court is limited to a determination as to whether the Commission's findings are supported by substantial evidence upon the record as a whole. See *Universal Camera Corp.* v. *NLRB*, 1951, 340 U. S. 474, 71 S. Ct. 456; *Mississippi Valley Barge Line Co.* v. *United States*, 1966, E.D. Mo., 252 F. Supp. 162; *Administrative Procedure Act* §10(e), 5 U.S.C. §1009(e). It is clear that

there is substantial evidence in the record to support the Commission's findings in this case; and its findings and conclusions are neither arbitrary nor capricious.

The law is clear that a court, in reviewing an administrative proceeding, is confined to the record made before the agency; it is not a trial de novo. See *National Broadcasting Co.* v. *United States*, 1943, 319 U. S. 190, 63 S. Ct. 997; *Southern Kan. Greyhound Lines, Inc.* v. *United States, supra.* The Criminal Information and the judgment of conviction (dated July 8, 1966) offered by plaintiff subsequent to the hearing, although not properly before us has been considered but does not call for reopening the case or for a contrary result.

The complaint is dismissed. The Clerk is directed to enter judgment accordingly.

/s/ LEONARD P. MOORE

United States Circuit Judge

JACOB MISHLER

United States District Judge

APPENDIX A-1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 65-C-1298

September 28, 1966

[SAME TITLE]

BARTELS, D. J.

I regret that I must dissent from the conclusion of the majority.

This case involves two related decisions of Division I of the Interstate Commerce Commission rendered on June 30, 1965, which the plaintiff, Armored Carrier Corporation, seeks to set aside. The first decision granted the intervenor B.D.C. Corporation authority as a common carrier to transport cancelled checks (known as cash letters) between Chicago, Illinois and five Wisconsin counties, reversing a contrary determination by Examiner Bernard J. Hasson. The second decision affirmed a determination by Examiner William Cave that the Commission's grant of emergency temporary authority to B.D.C. to serve the aforementioned five counties rendered moot a complaint by Armored that B.D.C. was serving these counties without the permission of the Commission. In both proceedings which were heard together by the Commission, the central issue was whether certain unauthorized operations and other derelictions by B.D.C. precluded it from satisfying the statutory criteria for a certificate of convenience and necessity.[1] These violations may be catalogued as follows: (1) B.D.C. engaged in unauthor-

ized operations over a four-year period between Chicago, Illinois and five counties in Wisconsin—Columbia, Dodge, Jefferson, Kenosha, and Walworth; (2) the vice-president of B.D.C. stated falsely that these unlawful operations had been discontinued when applying for temporary authority to serve these counties on November 27, 1961; (3) B.D.C. engaged in unlawful intrastate operations in Wisconsin; (4) B.D.C. unlawfully provided free interstate service to certain banks in operations between Chicago, Illinois and parts of Wisconsin; and (5) B.D.C. billed customers every thirty days coutrary to the Commission's seven-day requirement.

The hearings in both proceedings were held in 1962 and 1963 before different joint boards of the Commission in accordance with 49 U.S.C.A. §305. When neither of these boards could agree on a disposition of the matter before them, each referred its case to an examiner who rendered a decision based on the pre-existing "cold" record. Examiner Hasson recommended that permanent authority to serve the five Wisconsin counties be denied because B.D.C. "knowingly and wilfully committed * * * unauthorized operations" which were continued "despite a sworn statement by an officer of the corporation to the contrary". In the opinion of Examiner Hasson, these derelictions rendered it "doubtful that applicant can be trusted to comply with the obligations of regulated carriers" and mandated a finding that "applicant has not met the statutory burden of demonstrating its fitness". Examiner Cave fully agreed with Examiner Hasson's characterization of the violations

1. The pertinent statute, 49 U.S.C.A. §307(a), provides in part that "a certificate shall be issued to any qualified applicant therefore * * * if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder * * *."

as willful but felt constrained under the circumstances to dismiss the complaint before him on the ground of mootness.

Both of these decisions were appealed by the respective parties to a three man panel of the Commission (Division I) which by a 2-1 vote reversed Examiner Hasson and found B.D.C. to be "fit". In reaching this decision, the majority of the Commission stated that the unauthorized operations were "inadvertently begun", that "past unauthorized operations do not neeessarily act as a bar to a grant of authority to perform a needed service" and that "while we do not condone applicant's past unauthorized operations, we conclude that the evidence as to these operations does not require a finding of unfitness . . . ." While the majority opinion is curiously silent on the issue of whether the continued violations were or were not willful, the dissenting opinion unequivocally states that the willful character of the violations bars a finding of fitness.

At the time the Commission reversed Examiner Hasson, it affirmed Examiner Cave's decision that Armored's complaint against B.D.C. should be dismissed for mootness. After unsuccessfully petitioning the Commission for reconsideration and rehearing, Armored brought the present action on December 3, 1965, seeking both a preliminary and a permanent injunction. Since emergency temporary authority was granted to B.D.C. on December 6, 1961, and temporary authority on January 2, 1961, the Commission's affirmance of the dismissal of Armored's complaint against B.D.C. on the ground of mootness was proper. Moreover, since the Commission issued to B.D.C. a certificate of public convenience and necessity on January 12, 1966, a preliminary injunction is no longer available. Only the propriety of the order granting a certificate of public convenience and necessity may now be considered.

I.

Armored contends that the Commission failed to articulate the basis for its decision that B.D.C. was "fit" because it never expressed a view as to whether or not B.D.C.'s admitted illegal acts were knowingly and willfully performed. This failure, the plaintiff argues, is the vice of the decision because the Court is left to guess as to what the Commission intended. Armored also asserts that the violations were knowingly and willfully done precluding a finding of fitness and that any other result would not be supported by substantial evidence in the record.

B.D.C. claims that the majority of the Commission panel found, contrary to the Examiners, that its unauthorized operations were not willfully conducted but in fact were inadvertent and excusable. It bases this conclusion on the fact that the Commission obviously did not ignore the issue of willfullness since it stated that the unauthorized operations were "inadvertently begun" and do "not require a finding of unfitness". It further contends that the Examiners' conclusions must be ignored since there is substantial evidence in the record to support the Commission's finding which carries with it the necessary implication that the violations were non-willful. It excuses its violations as "obviously not serious" or "clearly minimal" or "done on the advice of counsel". As far as false statements by an officer are concerned, B.D.C. claims that the officer "was then a sick man" who "shortly thereafter took an extended leave of absence". The Government, in support of B.D.C.'s position, asserts that the violations were non-willful, repeating a number of B.D.C.'s contentions and stressing the fact that B.D.C.'s "admitted and alleged unauthorized operations comprise only a narrow facet of the totality of the make-up of a finding of fitness". It concludes that

B.D.C. is eminently well qualified in the areas of operational efficiency and financial security to perform the needed services.

II.

The issue here is whether the Commission's ultimate finding that B.D.C. is fit and should be granted a certificate of convenience and necessity, is supported by basic or subsidiary findings in the record. The majority concludes that B.D.C.'s four years of unauthorized operations do not, as a matter of law, bar the Commission's finding of fitness, citing nine subsidiary findings of the Commission in support of its ultimate finding of fitness. Five of these findings refer to B.D.C.'s ability to perform and the shippers' desire for continuation of its service. It appears from the Act that the issue of fitness is distinct and separate from the issue of ability and willingness to properly perform. Consequently, these findings are irrelevant to the issue as are the remaining findings except the one which states that the unauthorized operations were "inadvertently begun", although even this finding does not indicate that such unauthorized operations were inadvertently continued.

I believe that we cannot take a too restrictive view of the burden Congress intended to impose upon the Commission to examine and determine the fitness of an applicant for a certificate of public convenience and necessity. To approve a holding by the Commission without supporting findings that such an applicant is fit to perform an important public service despite four years of unauthorized operations plus other derelictions as earlier set forth, promotes in my opinion a dangerous precedent. An applicant must be fit and willing not only to properly

perform the service but also to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder. If the past conduct of B.D.C satisfies these requirements, the Commission offers no subsidiary findings or statements to support such a conclusion.

While it is elementary that the Commission's findings of fact cannot be set aside or disturbed if they are supported by substantial evidence (*United States* v. *Pierce Auto Freight Lines,* 1946, 327 U. S. 512, 66 S. Ct. 686; *Safeway Trails, Inc.* v. *United States,* D.C.D.C. 1964, 234 F. Supp. 362, 365; *Campus Travel, Inc.* v. *United States,* S.D.N.Y. 1963, 224 F. Supp. 146), nevertheless the ultimate finding of fitness must be supported by basic findings of fact in order that the Court may determine whether the ultimate fact is founded upon substantial evidence. Moreover, the "• • • common approach seeking to dichotomize all decisions as either 'law' or 'fact' is too simplistic; a reviewing court must often dissect the judgment into its component parts. Cf., *Baranow* v. *Gibraltar Factors Corp.,* F. 2d , (2 Cir. 1956), slip opinions 2627, 2632-35." *Artvale, Inc.* v. *Rugby Fabrics Corp. and Barmil Associates, Ltd.,* F. 2d (2 Cir. 1966), slip opinions 2677, 2684. Here the ultimate finding of fitness is predicated upon an application of the law to the facts. If we dissect the Commission's judgment into its component parts, we discover that the necessary component of subsidiary findings, is missing and that the Commission abdicated its obligation in this respect and has thus short-circuited the administrative process.

The majority suggests that *Southern Kansas Greyhound Lines* v. *United States,* W.D. Mo. 1955, 134 F. Supp. 502, *aff'd,* 1956, 351 U. S. 921, 76 S. Ct. 779, indicates that the

Commission need not make specific findings. Neither that case nor *Luckenbach S.S. Co.* v. *United States,* S.D.N.Y. 1954, 122 F. Supp. 824, *aff'd,* 347 U S. 984, 74 S. Ct. 850, also cited by the majority in the same context, can be stretched to cover the facts in this case. In *Southern Kansas Greyhound Lines* v. *United States, supra,* Mr. Justice Whittaker stated that a distinction must be made between "what the Commission must *hear and consider* and what it must *specifically find in its report*". In both cases the Commission made a finding as to the applicant's fitness and ability supported by subsidiary findings, but did not make a specific finding upon the subsidiary issues of the effect upon existing carriers of the new service to be rendered by the applicant. Section 14(1) of the Interstate Commerce Act, 49 U.S.C.A. §14(1), requires a finding by the Commission of fitness and ability but does not require a finding with respect to the detrimental effect of granting a certificate upon competitive carriers. As Mr. Justice Whittaker said "• • • Of course §14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order" (p. 508). Basic findings differ with the type of order invoked. "• • • [T]he basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented." *Alabama Great Southern R. Co.* v. *United States,* 1951, 340 U. S. 216, 228, 71 S. Ct. 264, 272.

In *United States* v. *Pierce Auto Freight Lines, supra,* the Court specifically held that the finding of fitness, willingness and ability of a motor carrier required basic findings to support it. In referring to the District Court's statement that the Commission had failed to find that the applicant was adequately equipped to render the service,

stated "• • • What was obviously meant was that such an ultimate finding was not enough, as of course it was not, see *State of Florida* v. *United States, supra,* in the absence of a basic finding to support it; and that there was no such basic finding" (p. 533). As explained in *State of Florida* v. *United States,* 1931, 282 U. S. 194, 215, 51 S. Ct. 119, 125:

> "• • • In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

and also in *Burlington Truck Lines, Inc.* v. *United States,* 1962, 371 U. S. 156, 167, 83 S. Ct. 239, 245:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice."

In granting its certificate to B.D.C., the Commission found in the statutory language that the applicant was fit, concluding that evidence as to past unauthorized operations "does not require a finding of unfitness" and admonishing B.D.C. that it was expected to behave in the future by complying with the Commission's rules and regulations. This ultimate finding is not enough.[2] In order that the

2. *Sinett* v. *United States,* D.C.N.J. 1955, 136 F. Supp. 37.

Court may adequately review the validity of the Commission's conclusion, it is necessary that the Court comprehend the basis for this finding of fitness. This is not possible without supporting statements explaining whether the unauthorized acts were willful or negligent transactions and, in either event, to what extent if any, such finding or findings affect the conclusion. With such findings the Court would then be able to ascertain whether the conclusion of fitness was properly supported. '" • • • In short, this court is at a loss to know just what the Commission has found or how the Commission has reasoned on the basis of its findings. At least for this reason, the court cannot give its seal of approval to the Commission's disposition of the matter.'" *Nashua Motor Express, Inc.* v. *United States,* D.C.N.H. 1964, 230 F. Supp. 646, 650.[3] Apparently, the Commission predicated its opinion primarily upon a desire to comply with the shippers' need for services rendered by B.D.C. and by the expectation that the applicant would hereafter conform to the Commission's rules and regulations. I find no authority, statutory or otherwise, to justify a finding of fitness upon such a premise.[4]

3. If the Commission found that these unauthorized operations were non-willful, it is difficult to understand why it has instituted a criminal proceeding against the applicant for knowingly unauthorized operations. In fact, on July 8, 1966, after B.D.C. entered a plea of *nolo contendere* in the United States District Court for the Western District of Wisconsin, it was adjudged guilty as charged and fined $200 on each of ten counts.

4. See the decision of the full Commission in *Antietam Transit Company Inc. Common Carrier Application,* 84 M.C.C. 459 (1961), reversing a decision of Division I in *Antietam Transit Company, Inc. Common Carrier Application,* 83 M.C.C. 175 (1960). In the latter case Commissioner Murphy in dissenting stated that "I am unable to agree with the majority that we may properly excuse these willful unlawful operations and grant authority simply because a need for service has been established, even if it is assumed that

The Commission's statement that the unauthorized operations were "inadvertently begun" is not a finding that for four years thereafter they were inadvertently continued. Moreover, it made no attempt to determine whether the other derelictions of B.D.C. were willful or unintentional. In the past when unauthorized acts were involved, the Commission predicated its determination of the question of fitness upon whether the unauthorized transactions were willful or non-willful,[5] but in the instant case it has chosen to avoid this issue.

Speculation as to the basis of the Commission's determination of fitness is insufficient to enable a review of

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such a need for service merits characterization as an 'overriding public need'" (pp. 181-182). In the former case the full Commission stated that "We are of the opinion that applicant's willful and deliberate performance of unauthorized operations and its continued refusal to abide by the provisions of the act require a conclusion that it is not fit properly to conduct the proposed operation, and that the application should be denied" (p. 461). But *cf., Myers Common Carrier Application,* 89 M.C.C. 125 (1962).

5. For example, in the following cases the Commission found that the violations were willful and denied the application: *Antietam Transit Company, Inc. Common Carrier Application,* 84 M.C.C. 459 (1961); *Newmarket Coach Lines, Limited, Common Carrier Application,* 84 M.C.C. 264 (1960); *Haywood Trucking Company Contract Carrier Application,* 81 M.C.C. 437 (1959), and in the following cases the Commission found that the violations were non-willful or non-recurrent and granted the application: *Rushing Common Carrier Application,* 84 M.C.C. 430 (1961); *Public Service Coordinated Transport* v. *United States,* D.C.N.J. 1965, 247 F. Supp. 985; *A.B. & C. Motor Transport Co.* v. *United States,* D.C. Mass. 1946, 69 F. Supp. 166. For additional cases illustrating this dichotomy see 3 *Consolidated Current Index to Decisions of the Interstate Commerce Commission,* Feb. 1956-Dec. 1963 (Chapter 23, §23.60-23.64). In the present case the Commission asserted that "we find the examiners' statements of fact to be substantially correct, and as modified herein we adopt them as our own". To what extent, if any, the modifications included a disavowal of the willful character of the unauthorized operations for the four-year period or of the other derelictions is far from clear. This illustrates the absence of an adequate basis for a proper review by the Court.

its conclusion. "• • • [A] simple but fundamental rule of administrative law • • • is that a reviewing court, in dealing with a determination of judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action • • •. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities and Exchange Commission* v. *Chanery Corp.*, 1947, 332 U. S. 194, 196, 67 S. Ct. 1575, 1577.

Therefore I would remand the case for further findings in accordance herewith.

JOHN R. BARTELS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This action having come on for hearing before the Honorable Leonard P. Moore, United States Circuit Judge, Jacob Mishler and John R. Bartels, United States District Judges, and the Court having filed its opinion dismissing the complaint and directing the entry by the Clerk of judgment accordingly, it is

Ordered and Adjudged that the complaint be dismissed.

Dated: Brooklyn, New York
October 3, 1966

LEWIS ORGEL
Clerk of the Court

APPENDIX C

STATUTE INVOLVED

Title 49 U.S.C.A. Section 307 (a).

"• • • (A) certificate shall be issued to any qualified applicant therefor; • • • if it is found that the applicant is fit, willing and able to properly perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder • • •."

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Served August 24, 1964

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-114533 (Sub-No. 32)

B.D.C. Corporation, Extension—
Five Counties

Decided

Applicant found not shown to be fit, willing, and able properly to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Application denied.

David Axelrod for applicant.

Claude J. Jasper, J. Kevin Murphy, and Joseph M. Scanlan for protestants.

Report and Order
Recommended by Bernard J. Hasson Jr.,
Hearing Examiner

By application filed December 1, 1961, B.D.C. Corporation, as applicant substituted for Bankers Dispatch Corporation by order of March 6, 1962, of Chicago, Ill., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of commercial papers, documents, and written instruments (except coins, currency, and negotiable securities) as are used in the conduct and operation of banks and banking institutions, between Chicago, Ill., on the one hand, and, on the other, points in Walworth, Jefferson, Dodge, Columbia and Kenosha Counties, Wis.

The application was referred to Joint Board No. 17 for hearing and the recommendation of an appropriate order. The State of Indiana waived its right to participate in the proceeding by failure of the member from that State to appear at the hearing. Hearings were held on March

13, 1962 and August 1 and 2, 1962, at Chicago, Ill. The joint board members from the States of Illinois and Wisconsin failed to agree upon a recommendation, and, in accordance with the provisions of Section 205(b) of the Act, the proceeding was referred to the examiner for a report and recommended order.

Armored Carrier Corp. opposes the application, but called no witnesses in its behalf. The Greyhound Corporation initially opposed the application, but withdrew between the first and continued hearings herein.

Applicant is presently authorized to transport the commodities here sought from and to a number of States, and, in its Sub-No. 2 proceeding, it sought authority to transport such commodities between Chicago, on the one hand, and, on the other, part of Indiana and 16 Wisconsin counties, including Kenosha County but excluding the other 4 counties here sought. Inexplicably, the report of the joint board omitted from its findings Kenosha County, although the evidence included testimony by a Kenosha bank official and the board stated it was recommending a grant without exception.

B.D.C. is financially fit to conduct the proposed operations and carries adequate insurance, including $75,000 reconstruction insurance hereinafter described. Prospective drivers are subjected to polygraph and fingerprint checks. It furnishes vaults to its customers, in outer lobbies where available, directly outside the door of the bank otherwise, or, if two banks are near each other, a single vault somewhere between the two. Bank employees place cash letters destined to a clearing bank in Milwaukee or in Chicago, and/or to the Chicago Federal Reserve Bank, in these vaults after the close of over-the-counter banking hours, and applicant's employees pick up on a

regular schedule, dropping the Milwaukee cash letters and putting Chicago letters on another vehicle in Milwaukee. Early in the morning, cash letters from the Chicago and Milwaukee banks are delivered to these vaults. This is a daily schedule 6 days a week.

B.D.C., which name shall be used to designate its predecessor Bankers Dispatch Corporation also, has served these five counties in interstate commerce without authority at least since the board's order in No. MC-114533 (Sub-No. 2) became effective. In that 1954 hearing its president admitted unlawful operations into Wisconsin since 1953. It serves 2 banks in Columbia County, 5 in Dodge County, 3 on the line between Jefferson and Dodge Counties, 5 in Jefferson County, 3 in Kenosha County, and 10 in Walworth County, using 9 or 10 of its 32 motor vehicles, 12 of which are owned by applicant and the remainder leased from B.D.C. Leasing Company.

Both B.D.C., an Illinois corporation, and Bankers Transport Corp., a Wisconsin corporation, are owned by B.D.C. Corporation of Delaware, and the three have officers and some directors in common. Prior to the continued hearing herein, Bankers Transport held intrastate authority in Wisconsin, and it is asserted that the drivers of the vehicles are or were actually employed by both applicant and Bankers Transport picking upon and transporting the interstate shipments for the former and intrastate shipments for the latter. The pickup vehicles are registered in the name of Bankers Transport, and before December 5, 1961, it issued payroll checks, but B.D.C. now does. The original application for intrastate authority in Wisconsin was filed by Bankers Transport, as the persons in control of B.D.C. believed a domestic corporation was required. At the hearing on that application, in 1957, the examiner

informed all present that a foreign corporation could hold operating authority in Wisconsin and the authority was granted to B.D.C. At that time B.D.C. found that the name "Bankers Dispatch" could not be registered with the Secretary of State of Wisconsin as a foreign corporation authorized to do business in Wisconsin, because the name had been pre-empted by an Indiana corporation controlled by the Controlling stockholder of Armored Carrier. The Wisconsin rights were not assigned to Bankers Transport (as advised by the Wisconsin Commission), until 1959. Between the two hearings herein, the rights were reassigned to B.D.C. Those rights are limited to service for the First Wisconsin National Bank of Milwaukee, but as its authority is worded "between points in Milwaukee County, on the one hand, and, on the other" points in named counties, it believes the intent was to authorize it to serve all correspondents of the First Wisconsin, and the examiner who heard its Wisconsin application so testified in another hearing, such testimony being a matter of record in this proceeding.

In December, 1961, upon advice of counsel, when its service to and from these correspondent banks was questioned by formal complaint, it began performing free intrastate transportation from the correspondent banks to Milwaukee, but its president asserted at the continued hearing herein on August 1, 1962, that it was charging the First Wisconsin.

It began serving 2 banks beside the First Wisconsin, and their correspondent banks, in the belief it was lawful to add intrastate contracts, but it no longer serves them.

Applicant formerly billed customers every 30 days, contrary to the Commission's 7-day requirement, but since July 1962, its bill of lading is an invoice, in effect, a

daily bill to each bank. It also filed a petition for relief from the 7-day credit rule. From the time of the grant of intrastate authority to B.D.C. in 1957, it will be seen that Bankers Transport had no intrastate authority and B.D.C. was not registered to do business in Wisconsin, so that between that time and the formal assignment in 1959 (followed by the 1962 registration and reassignment) the operations could not have been other than unlawful.

On November 27, 1961, its statement supporting its Sub-No. 34TA application, signed by a vice president, recited that it had discontinued service to these counties. At the hearing herein, another vice president and the president admitted this was incorrect and that it had continued to serve the banks between that date and December 6, when the emergency temporary authority which preceded the temporary authority, became effective.

The vice president and general counsel of protestant testified as a witness called by applicant that protestant, a contract carrier, first operated into Wisconsin in January 1962, under temporary authority in the transportation of cash letters, although it has held intrastate authority since 1953. The day before the initial hearing in the instant proceeding, protestant amended its Sub-No. 83 application at hearing to exclude the 5 counties here sought, but on the same day filed another application, docketed Sub-No. 95, seeking those counties. Its temporary authority is limited to named points.

The Federal Reserve Bank of Chicago has used applicant and its predecessor since applicant received authority in 1957 to serve 15 counties in Wisconsin which, like the 5 counties here sought, are part of the Seventh Federal Reserve District. Its use is on a daily, 24 hour basis, giving cash letters to various carriers between 6 and

7 p.m., and expecting receipt of same from outlying banks as early as possible. When cash letters from the banks are not received by a stated hour, its legal reserve is not credited until the following day. Banks receiving cash letters from Federal Reserve are required to remit from proceeds on the day of receipt, and it should be received the following day; otherwise the depositor bank has the use of money virtually on an unsecured loan basis.

The Federal Reserve Bank formerly used railway mail or railway express service for the transfer of cash letters, arranging its dispatch or release hours to meet various train schedules. It still uses mail service for about half its shipments.

Applicant, like mail service, provides door-to-door deliveries, and applicant also provides "reconstruction insurance" which covers the cost to the Federal Reserve of s ing up a task force of employees to reconstruct the it ms in a lost or mutilated cash letter. Protestant Armored Carrier Corp., which it also uses, provides insurance also, although the coverage is less than that of applicant.

The First National Bank of Columbus, Wis., in Columbia County, places its daily cash letters in a vault provided by applicant, across the street from the bank, about 3:30 p.m., and they are delivered to the Federal Reserve Bank, or the First National Bank of Illinois in Chicago. About 90 per cent of its cash letters are transported by applicant, the rest being mailed. Most of its outbound traffic is to Milwaukee; most of the inbound is from Chicago.

Ten other so-called country banks also support the application. Generally, their operations are conducted as

are those described immediately above. The First National Bank of Kenosha supported applicant's Sub-No. 2 application, ships as late as 10 p.m., and is billed monthly. The Kenosha National Bank ships to the Harris Trust Co. of Chicago and receives a daily cash letter from the Federal Reserve Bank. Bankers Transport is believed to be performing the intrastate service. The Brown National Bank of Kenosha ships to the Federal Reserve and the Continental Illinois National Bank & Trust Co. The First National Bank of Elkhorn (Walworth County) ships to and receives from the Federal Reserve and the First National Bank of Chicago. The Farmers State Bank of Darien (Walworth) ships to the Continental Illinois and receives daily returns from the Federal Reserve. The Old National Bank of Beaver Dam (Dodge) ships to the Federal Reserve and the First National Bank of Chicago. The Farmers and Merchants Union Bank of Columbus (Columbia) ships and receives to and from the Continental Illinois and the American National Exchange Bank. The Farmers and Merchants Bank in Jefferson (Jefferson County) ships to the First National Bank of Chicago and receives from the Federal Reserve. The Citizens State Bank of Ft. Atkinson (Jefferson) receives from the Federal Reserve. It also sends instruments other than cash letters. The Ixonia State Bank (Jefferson) receives daily from the Federal Reserve and sends one cash letter a week to the American National Bank & Trust Co. of Chicago. None of these banks recall any interruption in service although applicant's application for temporary authority to serve these counties avers discontinuance from November 27, 1961, and it was asserted that this was the case until December 6, 1961, when temporary authority was granted. Applicant's president does not think the

discontinuance took place although the vice president who made the allegation was in charge of actual operations at the time.

As recited, protestant called no witnesses, but introduced a number of counsel's exhibits. One, a transcript of testimony of applicant's president, shows that unauthorized interstate transportation into Indiana was commenced in August, 1953, and that the Commission's district supervisor advised the witness to cease such operations on December 10, 1953. Another exhibit identified by the president in the hearing on applicant's Sub-No. 2 application clearly and unmistakeably depicts the 15 Wisconsin Counties there sought. In another transcript in April 1959, the president admitted unlawful operations in Michigan, Indiana, and Ohio, although he professed at a March 1959 hearing that he was not acquainted with any Niles, Mich., to South Bend, Ind., movements being conducted.

Briefs

Applicant takes the initial position that protestant is not a proper party, as it holds no permanent interstate authority to serve Wisconsin and does not serve the supporting banks. It further objects to the admission into evidence of Public Service Commission of Wisconsin hearing transcripts as being irrelevant and also because appeals from the intrastate proceedings were pending.

Applicant contends its free service is solely a matter of Wisconsin law; that it is not rendered for compensation and is thus beyond Wisconsin's jurisdiction and is without effect upon, and should not be considered by, the Interstate Commerce Commission.

Finally, it asserts the past operations in Wisconsin without appropriate authority were not wilful and should

not bar a grant of authority to render a service needed by the public.

Protestant in general opposes each of applicant's arguments, principally focusing upon applicant's good faith, credibility, and statutory fitness. In view of the conclusions below, extensive recitation of protestant's arguments is unnecessary.

Discussion and Conclusions

Applicant's objection to protestant's appearance will be considered first. The board allowed protestant's participation and reserved ruling on the objection. In *Alton R. Co.* v. *United States,* 315 U. S. 15 (1941), the Supreme Court affirmed the right of a railroad to participate in motor carrier hearings before this Commission, ruling:

> "They are members of the national transportation system which (the motor carrier) Act was designed to coordinate. * * * Hence they are parties in interest within the meaning of Section 205(h)."

The examiner regards the *Alton* case as conclusive of the issue, with the observation that participation at the administrative level does not of necessity ripen into legal or equitable standing by such a party to seek to alter or set aside the Commission's ultimate order, since there may never repose in such party any justifiable interest. *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479, 486 (1930), *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 130 F. Supp. 76 (E.D. Mo. 1955) *aff'd,* 350 U. S. 892 (1955). Applicant's objection is overruled.

Applicant's objection to the admission of the Wisconsin transcripts will be considered next. Essentially, the objection is that only what may be called intrinsic evidence;

i.e., evidence of operations, as a motor carrier, in interstate commerce, may be considered as bearing on an applicant's fitness. The fallacy of this argument is that under its aegis a narcotics peddler could be found fit and granted authority but an unwittingly unlawful trucker from the backwoods of Virginia could not. Clearly, extrinsic evidence of any facet of an applicant's fitness is relevant and material if this Commission is to discharge its duties under the statute. No other inference is possible from *Castle* v. *Hayes Freight Lines,* 348 U. S. 61 (1954). The examiner thus supplements the board's overruling of applicant's objections to these exhibts.

The Wisconsin transcripts reveal a pattern of unauthorized operations within that State much like those recited above, by the subsidiary Bankers Transport Co. The Wisconsin Commission found that such operations, for 103 banks, had been wilfully performed.

With respect to the provision of free service to correspondent banks of the First Wisconsin (and without giving any consideration to the service provided correspondents of 2 other Milwaukee banks, since that service was discontinued and the clearing banks are not named in applicant's Wisconsin permit), Division 1 of the Commission by its order of October 4, 1963, adopting the board's report and recommendation in No. MC-C-3480 (Sub-No. 1) *Armored Carrier Corp.* v. *B. D. C. Corporation,* 92 M.C.C. 665, found the provision of free service to be violative of both Sections 216(d) and 21(b) of the Interstate Commerce Act. That service was provided upon the specific written advise of counsel and appears to have constituted an attempt to eliminate one form of unlawful operation under color of right. The examiner is of the opinion that the Division's findings should not be a bar to applicant's fit-

ness. Its Wisconsin license authorizes a "between" service between Milwaukee County and these 5 counties as well as others, for the First Wisconsin National Bank *only*. As it is a "between" operation, and in accord with the testimony of the examiner who heard the application, there is some merit to applicant's claim that it is authorized to serve correspondents of the First Milwaukee. If it is not so authorized, of course, all the service is simply unlawful, rather than prejudicial to other traffic. But assuming it is lawful, the examiner does not believe it constitutes a practice preferential to these banks and prejudicial to the traffic of other banks, *because applicant holds no authority to serve other Wisconsin banks in intrastate commerce from and to Milwaukee.* Moreover, there is no showing there by complainant, or contention by any other bank in Wisconsin, Indiana, or Michigan, that they were, are, or may be, hampered in their ability to compete, either at their origins or at Chicago, by the failure of applicant to provide them with concomitant free intrastate service. See *Atchison Chamber of Commerce* v. *A. & B. Transfer, Inc.,* 309 I.C.C. 635. A violation of these sections may not be assumed in the absence of evidence. *Ryder System Inc. —Control—Miller,* 70 M.C.C. 265 (1956).

The extension of credit to shippers beyond the 7-day period permitted by the Commission presents several questions. The president's sworn testimony in this record is that the 30-day billing had ceased, but it is argued by protestant on brief that applicant's executive vice president in a later hearing testified that this was not so. That testimony is not a matter of record herein, however. The evidence of record indicates that while applicant in effect bills on a daily basis, through the procedure described above, it does not diligently collect on a seven-day basis,

nor do its customers expect to have to pay on that basis. Failure to observe the 7-day rule in the future could well lead to proceedings under the Elkins Act against both applicant and its delinquent customers, since, on this record, is inescapable that the purported compliance with the 7-day requirement is not mere lip service but is understood to be such by the banks.

The evidence demonstrates admitted and continual unauthorized operation since 1953 between Illinois and Wisconsin. As described, a novel misunderstanding of the law has explained each incident; new wine has been poured into each empty bottle found on the premises. But, if notice of the law were a prerequisite to required adherence, it can be demonstrated that every motor carrier in this country has been well and often apprised of this Commission's regard for its duty, to enforce the provisions of the Act. In October, 1941, following on the heels of a severe economic depression and with the threat of war ahead, the Commission nevertheless warned of its intention to properly administer this Act in these words:

> It may be, however, that in the near future, we shall, in the light of several years of administration of the provisions of the Act, with ample opportunity on the part of motor carriers to familiarize themselves therewith, adopt a more strict and inflexible rule to the effect that evidence of unlawful operations renders an applicant unfit properly to perform the services for which authority is sought and precludes a grant of authority therefor. *Miller & Cahill Common Carrier Application,* 30 M.C.C. 737.

In another case principally concerned with this issue, *L-P Gas Transport, Inc., Contract Carrier Application,*

61 M.C.C. 611 (1953), the Commission made clear its policy in this language:

> In its exceptions to the order denying the application recommended by the examiner after the fitness hearing, applicant contends, among other things, that to deny the application solely on the basis of unfitness would lead to a harsh result and that the evidence with respect to a need for the proposed operation should be considered. There is no merit to this contention. Obviously if an applicant is found not fit to perform a proposed operation it cannot be found that the public needs his service. A need for service cannot be met by an unfit operator. We have a duty to protect the public generally which goes beyond the needs of individual shippers.

In two 1959 cases, the Commission restated the prohibition thusly:

> Any individual who wilfully and knowingly ignores the primary requirement that he obtain operating authority can hardly be trusted to comply with the obligations a regulated carrier is expected to observe in his relations with shippers and the public. *Barrett Common Carrier Application,* 79 M.C.C. 753.

And in *Johnson & Son Common Carrier Application,* 79 M.C.C. 362, the Commission said:

> Compliance with the statutory requirements should not be subordinated to the needs of shippers who are implicated in applicant's unauthorized operations.

Applicant and its officers have all too often revealed their awareness of the illegal nature of the service here in question to now claim surprise. The limits of its authority have been described not only to this Commission but to the Wisconsin Commission and the Securities and Exchange Commission under oath.

That the unauthorized operations in issue were knowingly and wilfully committed is thus not open to serious question:

> We are persuaded that it (wilfully) means purposely or obstinately and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, at 243.

To the same effect is *Ace Lines, Inc.,—Suspension or Revocation of Certificates,* 76 M.C.C. 667 (1958), and cases cited. The all-pervading nature of the violations is best illustrated by the admitted fact that, despite a sworn statement by an officer of the corporation to the contrary, such operations did not cease even for the relatively short period of November 27—December 6, 1961. In short, it is, as the *Barrett* case, *supra,* observed, doubtful that applicant can be trusted to comply with the obligations or regulated carriers, and, while there is no other available service, the needs of these particular shippers cannot override the statutory requirements in view of their implication in the events recited. While mere failure to pay the carrier on time is not a violation of the Elkins Act *per se,* the situation appears different here. See *Continental Shippers Ass'n.* v. *United States,* 328 F. 2d 966 (9th Cir. 1964).

The examiner concludes, therefore, that applicant has not met the statutory burden of demonstrating its fitness.

FINDINGS

The examiner finds that applicant has not been shown to be fit, willing and able to hold authority from this Commission or to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder, and that the application should be denied.

In view of the findings here, the examiner recommends that the appended order be entered.

By Bernard J. Hasson, Jr., Hearing Examiner.

(Signature) BERNARD J. HASSON JR.

Recommended by Bernard J. Hasson Jr.
Hearing Examiner.

(Signature) BERNARD J. HASSON JR.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1964.

No. MC-114533 (Sub-No. 32)

B.D.C. CORPORATION EXTENSION—
FIVE COUNTIES

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made

and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

IT IS ORDERED, That the application be, and it is hereby, denied.

AND IT IS FURTHER ORDERED, That this order shall be effective on

By the Commission, division 1.

HAROLD D. MCCOY
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Served August 24, 1964

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-C 3480

ARMORED CARRIER CORPORATION

v.

B.D.C. CORPORATION[1]

Decided

Defendant, B.D.C. Corporation, found (a) to have knowingly and willfully operated without authority as

1. At the time the complaint in this proceeding was filed the name of defendant was Bankers Dispatch Corporation. In February 1962 its name was changed to B.D.C. Corporation.

a common carrier by motor vehicle, in interstate or foreign commerce, of cash letters, between Chicago, Ill., and points in five Wisconsin Counties during a period of four consecutive years immediately preceding December 6, 1961, in violation of Sections 203 and 206 of the Interstate Commerce Act, and (b) now to be conducting the operation complained of under temporary authority. Complaint dismissed as issue in question is moot.

Claude J. Jasper, James K. Knudson, and J. Kevin Murphy for complainant.

David Axelrod and Carl J. Steiner for defendant.

REPORT AND ORDER

Recommended by William J. Cave, Hearing Examiner

By complaint filed November 27, 1961, Armored Carrier Corporation, of Bayside, N. Y., alleges that defendant, B.D.C. Corporation, of Chicago, Ill. (formerly known as Bankers Dispatch Corporation as indicated in footnote 1) willfully was conducting unauthorized operations in interstate or foreign commerce as a for-hire carrier in the transportation of cash letters between Chicago, Ill., on the one hand, and, on the other, points in certain Wisconsin Counties, particularly, Kenosha, Walworth, Jefferson, Dodge, and Columbia Counties, all in violation of Sections 203, 206, 209, 210, 216, and 218 of the Interstate Commerce Act; and that such lawful operations have proved detrimental to the motor carrier business of complainant.

The complaint contains a prayer that defendant be required to answer the charges in respect of the alleged unlawful operation; that the Commission enter an order requiring defendant to cease and desist from the said

unlawful operations; that the Commission not grant defendant any emergency or temporary authority to conduct the operations which are the subject of the complaint pending final determination of the issues in this proceeding; and that the Commission enter such further order or orders as may be deemed proper in the premises.

By its answer,[2] which was not filed until the time of the initial hearing herein, defendant admits that as of the time the complaint was filed it was operating as alleged between Chicago, on the one hand, and, on the other, points in the above-named Wisconsin Counties, but it asserts that it lawfully has performed the service under temporary authority or emergency temporary authority since December 6, 1961. It specifically denies that it was operating in violation of Sections 203, 206, 209, 210, 216, and 218 of the Act at the time of hearing herein. Defendant prays that the complaint be dismissed because complainant has no real or substantive interest in the subject matter of the complaint. Moreover, it argues on brief that the issues were moot at the time of hearing because defendant then held temporary authority to conduct the operations complained of.

Hearing in this proceeding was held in Chicago, Ill., on April 30, 1962, and on January 29 and 30, 1963, before Joint Board No. 13. The members of the said Board were unable to agree upon a recommendation, and, in accordance with the provisions of Section 205(b) of the Interstate

2. The answer was not accepted by the joint board to whom the proceeding was referred for hearing because it was not filed within 20 days of the date of service of the complaint as provided for in Section 1.35(c) of the Commission's General Rules of Practice. The examiner believes the answer should have been accepted even though it was not timely filed. Therefore, the renewed motion by applicant on brief to accept the answer is granted.

Commerce Act, the proceeding was referred to the examiner for a report and recommended order.

Complainant is a motor contract carrier of such commercial papers, documents, and written instruments as are used in the conduct and operation of banks and banking institutions. It holds authority to operate in interstate or foreign commerce and to serve points in a number of States. However it is not authorized to transport cash letters between Chicago, Ill., on the one hand, and, on the other, points in Wisconsin.

Defendant is a motor common carrier authorized to operate in interstate or foreign commerce in the transportation of the same commodities which complainant transports. As here pertinent, it operates between Chicago and points in 15 counties in Wisconsin, some of which are contiguous to the Wisconsin Counties of Columbia, Dodge, Jefferson, Kenosha, and Walworth named in the complaint as those which defendant unlawfully has served. In addition to the described permanent authority, defendant holds temporary authority in No. MC-114533 (Sub-No. 34)TA to transport cash letters between Chicago, on the one hand, and, on the other, points in the 5 Wisconsin Counties named above. This temporary authority is conditioned to expire upon final determination of defendant's application in No. MC-114533 (Sub-No. 32) for corresponding permanent authority. Defendant is one of a number of affiliated carriers owned by Bankers Dispatch Corporation of Delaware.

In the interest of expediting the hearing in this proceeding and of presenting all of the facts with respect to the past operations of defendant which are pertinent to consideration of the issues raised by the complaint and answer, the parties obtained approval of their stipulation

to incorporate by reference the evidence adduced at the hearing on defendant's application in No. MC-114533 (Sub No. 32). Some of the facts developed in the application proceeding relate to certain unlawful practices by defendant which are not here in issue, and those facts will not, therefore, be discussed even though they are referred to on brief by the parties herein.

As hereinbefore indicated, defendant first obtained emergency temporary authority on December 6, 1961, to transport cash letters between Chicago, on the one hand, and points in Columbia, Dodge, Jefferson, Kenosha, and Walworth Counties, Wis. Prior to that date defendant admittedly performed this service without authority for at least four years. In a statement dated November 27, 1961, accompanying defendant's application for temporary authority in No. MC-114533 (Sub-No. 34)TA, the vice-president of defendant informed the Commission that defendant (or the applicant in that proceeding) had discontinued the unlawful operations between Chicago and the Wisconsin territory. However, at the hearing on the application in No. MC-114533 (Sub-No. 32) held in March and August 1962, defendant's president and vice-president admitted that the information given to the Commission in 1961 concerning the discontinuance of unlawful operations was false, and that the unlawful operations were not discontinued until December 6, 1961, when defendant obtained the emergency temporary authority.

An affiliate of defendant, Bankers Transport Corporation of Wisconsin, assisted applicant in the performance of the described unlawful operations by transporting, without authority, interstate shipments between Milwaukee, Wis., and points in the Wisconsin Counties hereinbefore named. Defendant and its affiliate here named have officers in com-

mon. In connection with applications either before the Wisconsin Public Service Commission or the Interstate Commerce Commission, the officers of these affiliated carriers admitted that the described unlawful operations had been performed.

Discussion and Conclusions

The evidence clearly establishes that defendant operated without authority for at least four consecutive years immediately preceding December 6, 1961, in the transportation of cash letters moving between Chicago, on the one hand, and, on the other, points in Columbia, Dodge, Jefferson, Kenosha, and Walworth Counties, Wis., that the described unlawful operations were also performed between January 5, 1962, after expiration of defendant's emergency temporary authority in No. MC-114533 R-6, and January 27, 1962, when defendant met the Commission's tariff requirements for operations authorized under temporary authority granted, in No. MC-114533 (Sub-No. 34)TA, on January 2, 1962; and that the described unlawful operations were willfully performed as defendant's president and other officers knew that defendant held no authority from the Commission authorizing the operations.

Defendant does not hold any contract carrier authority from the Commission and it has not operated as a contract carrier even though it has had some contractual arrangements with the banks which it has been serving as a common carrier. Therefore there is no merit to the contention of complainant that defendant has operated as a contract carrier in violation of Sections 209 and 218 of the Act, or that it has conducted dual operations both as a common and contract carrier in violation of Section 210 of the Act. Defendant has not violated Section 216 of the Act through

its failure to establish, observe, and enforce just and reasonable rates, charges, and classifications in connection with transportation services between the points under consideration for the reason that it may not lawfully establish charges for a service it is not authorized to perform.

Although defendant is shown to have willfully operated for a number of years, prior to the time of hearing herein, in the performance of an unauthorized motor common carrier service in violation of Sections 203 and 206 of the Act, the issue with respect thereto was moot at the time of hearing because defendant then held temporary authority to perform the service in question. As indicated, that temporary authority is now in effect but is conditioned to expire upon final determination of defendant's application in No. MC-114533 (Sub-No. 32).

If this were an investigation proceeding instituted by the Commission, some of the punitive measures which complainant urges should be taken because of repeated willful violations by defendant of various Sections of the Interstate Commerce Act would be warranted. However, this is a complaint proceeding which is confined to the issues raised by the complaint and answer and the facts developed in respect thereto, and the examiner's recommendation with respect to the action, if any, to be taken against defendant should be in conformity therewith. No action can be recommended which goes beyond the scope of the complaint.

The examiner finds (1) that defendant, B.D.C. Corporation, willfully operated for at least four consecutive years immediately preceding December 6, 1961, as a motor common carrier by motor vehicle in the transportation of cash letters between Chicago, on the one hand, and, on

the other, points in Columbia, Dodge, Jefferson, Kenosha, and Walworth Counties, Wis., without authority and in violation of Sections 203 and 206 of the Interstate Commerce Act; (2) that defendant now holds, and at the time of hearing herein was holding temporary authority to conduct the above-described operation complained of; (3) that the issue with respect to the operation described in (1) above is moot; and (4) that the complaint should be dismissed.

It is recommended that the appended order be entered.

By William J. Cave, Hearing Examiner.

(Signature) William J. Cave

Recommended by William J. Cave, Hearing Examiner

(Signature) William J. Cave

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1964.

No. MC-C-3480

ARMORED CARRIER CORPORATION

v.

B.D.C. CORPORATION

This proceeding being at issue on complaint and answer on file, and full investigation of the matters and things involved having been made, said complaint on due notice

having been heard by Joint Board No. 13, which Board was unable to agree upon a recommendation, and the matter then having been referred to the examiner, who has prepared a report containing his findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and said proceeding having been duly submitted:

IT IS ORDERED, That the complaint be, and it is hereby, dismissed.

AND IT IS FURTHER ORDERED, That this order shall become effective on

By the Commission, division 1.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX F

Served July 12, 1965

M-11324

INTERSTATE COMMERCE COMMISSION

No. MC-114533 (Sub-No. 32)

B. D. C. CORPORATION, EXTENSION—FIVE COUNTIES

No. MC-114533 (Sub-No. 32)[1]

B. D. C. CORPORATION, EXTENSION—FIVE COUNTIES

Decided June 30, 1965

1. In No. MC-114533 (Sub-No. 32) public convenience and necessity found shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of commercial papers, documents, and written instruments (except coins, currency, and negotiable securities) as are used in the conduct and operation of banks and banking institutions, between Chicago, Ill., on the one hand, and, on the other, points in Walworth, Jefferson, Dodge, Columbia, and Kenosha Counties, Wis. Issuance of a certificate approved upon compliance by applicant with certain conditions.

1. This report also embraces No. MC-C-3480, Armored Carrier Corporation *v.* B.D.C. Corporation.

2. In No. MC-C-3480, applicant found to be conducting the operation complained of between Chicago, Ill., and five Wisconsin counties under temporary authority. Complaint dismissed.

David Axelrod for applicant in No. MC-114533 (Sub-No. 32).

Claude J. Jasper, J. Kevin Murphy, and *Joseph M. Scanlan* for protestants in No. MC-114533 (Sub-No. 32).

Claude J. Jasper, James K. Knudson, and *J. Kevin Murphy* for complainant in No. MC-C-3480.

David Axelrod and *Carl J. Steiner* for defendant in No. MC-C-3480.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONER MURPHY, BUSH, AND BROWN

BROWN, *Commissioner:*

These proceedings were heard on separate records. The complaint involves matters affecting B.D.C. Corporation's fitness in the application proceeding, and the subject matter of the complaint concerns operations which are the same as those proposed in the application. In addition, the parties stipulated in the complaint to incorporate by reference evidence introduced at the hearing in the application proceedings. These two proceedings, therefore, are closely related and will be treated herein as a single report.

In the application proceeding applicant filed exceptions to the examiner's recommendations, and protestant Armored Carrier Corporation replied. In the complaint proceeding both complainant and defendant filed exceptions, and each replied to the exceptions of the other.

The authority sought in the application and the alleged violations which are the subject of the complaint are described in detail in the appendix. In substance, the complaint, filed November 27, 1961, charges B.D.C. Corporation,[2] of Chicago, Ill. with having knowingly and willfully transported shipments of canceled checks known as cash letters between Chicago, Ill., and the five Wisconsin Counties of Kenosha, Walworth, Jefferson, Dodge, and Columbia. In the application, filed December 1, 1961, common carrier authority is sought to transport cash letters between Chicago and the same five Wisconsin counties. B.D.C. acknowledges that it performed these operations without authority for 4½ years beginning in 1957, but it claims that this was done inadvertently and not "knowingly and willfully." Since December 6, 1961, it has held temporary authority pending the outcome of this application.

In the complaint proceeding the examiner found that B.D.C. had willfully performed the considered operations without authority for at least 4 years but that the question in issue is moot because B.D.C. now holds appropriate temporary authority therefor. He recommended that the complaint should be dismissed. In the application proceeding a different examiner recommended that B.D.C. be found *not* fit and that the application be denied.

In each proceeding the evidence adduced, the examiner's recommendations, the exceptions, and the replies have been considered. We find the examiners' statements of fact to be substantially correct, and as modified herein we adopt them as our own.

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2. The application and complaint originally described the applicant-defendant as Bankers Dispatch Corporation. That name has since been changed to B.D.C. Corporation, and the new name is used throughout this report.

B.D.C. is a motor common carrier of cash letters and of other items having similar transportation characteristics, including photographic film and accounting records. Its operations have expanded from a modest beginning in 1953 to a point where it now occupies a position of prominence in its special field. B.D.C. holds numerous grants of operating authority both from this Commission and from various State agencies. Its operations extend through a large territory centered in the Midwest.

By application in No. MC-114533 (Sub-No. 2), filed July 31, 1956, B.D.C. sought, *inter alia*, authority to transport cash letters between Chicago and points in 16 Wisconsin counties including Kenosha County. Joint Board 17 recommended that B.D.C. be granted authority to provide service in 15 of those 16 counties, but without explanation the board omitted Kenosha County from its recommended grant of operating authority. No exceptions were filed, and the joint board's recommended order became effective as the order of the Commission on January 7, 1957. A certificate was issued on April 4, 1957, embracing the 15 counties granted by the joint board.

When B.D.C. instituted operations under its new certificate in May 1957 it also instituted operations between Chicago and points in Kenosha County and, in addition, Walworth, Jefferson, Dodge, and Columbia Counties. The last four were counties which were not named in the 1956 application. These five counties are in B.D.C.'s line of haul between Chicago and the other 15 counties. B.D.C. thought it had been granted authority to serve these along with the other 15 counties. Because of this and the inexperience of its management these operations were inadvertently begun.

Armored Carrier opposes the application, but called no witnesses in its behalf. The Greyhound Corporation initially opposed the application, but later withdrew.

B.D.C. is financially fit to conduct the proposed operations and carries adequate insurance, including $75,000 reconstruction insurance. Prospective drivers are subjected to polygraph and fingerprint checks. It furnishes vaults to its customers, in outer lobbies where available or directly outside the door of the bank. If two banks are near each other, a single vault is furnished. Bank employees place cash letters destined to a clearing bank in Milwaukee or in Chicago, and/or to the Chicago Federal Reserve Bank, in these vaults after the close of over-the-counter banking hours. Applicant's employees pick up on a regular schedule, dropping the Milwaukee cash letters and putting Chicago letters on another vehicle in Milwaukee. Early in the morning, cash letters from the Chicago and Milwaukee banks are delivered to these vaults. This is done on a daily schedule 6 days a week.

The Federal Reserve Bank of Chicago has used applicant and its predecessor since applicant received authority in 1957 to serve 15 counties in Wisconsin which, like the 5 counties here sought, are part of the Seventh Federal Reserve District. Its use is on a daily 24-hour basis, giving cash letters to various carriers between 6 and 7 p.m., expecting receipt of same from outlying banks as early as possible. When cash letters from the bank are not received by a stated hour, its legal reserve is not credited until the following day. Banks receiving cash letters from Federal Reserve are required to remit from proceeds on the day of receipt.

The Federal Reserve Bank formerly used railway mail or railway express service for the transfer of cash letters,

arranging its dispatch or release hours to meet various train schedules. It still uses mail service for about half of its shipments.

Applicant, like mail service, provides door-to-door deliveries, and applicant also provides "reconstruction insurance" which covers the cost to the Federal Reserve of setting up a task force of employees to reconstruct the items in a lost or mutilated cash letter.

The First National Bank of Columbus, Wis., located in Columbia County, places its daily cash letters in a vault provided by applicant about 3:30 p.m. They are delivered to the Federal Reserve Bank, or the First National Bank of Illinois in Chicago. About 90 percent of its cash letters are transported by applicant, the rest are mailed. Most of its outbound traffic is to Milwaukee; most of the inbound is from Chicago.

Ten other so-called country banks also support the application. Generally, their operations are conducted similarly to those described above. The First National Bank of Kenosha supported applicant's Sub-No. 2 application. It ships as late as 10 p.m., and is billed monthly. The Kenosha National Bank ships to the Harris Trust Co. of Chicago and receives a daily cash letter from the Federal Reserve Bank. The Brown National Bank of Kenosha ships to the Federal Reserve and the Continental Illinois National Bank & Trust Co. The First National Bank of Elkhorn (Walworth County) ships to and receives from the Federal Reserve and the First National Bank of Chicago. The Farmers State Bank of Darien (Walworth County) ships to the Continental Illinois and receives daily returns from the Federal Reserve. The Old National Bank of Beaver Dam (Dodge County) ships to the Federal Reserve and the First National Bank of Chicago. The

Farmers and Merchants Union Bank of Columbus ships and receives to and from the Continental Illinois and the American National Exchange Bank. The Farmers and Merchants Bank in Jefferson (Jefferson County) ships to the First National Bank of Chicago and receives from the Federal Reserve. The Citizens State Bank of Fort Atkinson (Jefferson County) receives from the Federal Reserve. It also sends instruments other than cash letters. The Ixonia State Bank (Jefferson County) receives daily from the Federal Reserve and sends one cash letter a week to the American National Bank & Trust Co. of Chicago.

Discussion and Conclusions

For a number of years B.D.C. has provided this service for the supporting shippers. During the period from April 1957 to November 1961 neither the Commission, the complainant, nor any other carrier questioned the lawfulness of B.D.C.'s operations. When the operations were questioned by the filing of Armored Carriers' complaint, B.D.C. sought and received from the Commission temporary authority to so operate. The public need for the service is unquestioned. The shipping public has come to rely on the complete service offered by B.D.C. for many years now.

In *Crawford Common Carrier Application,* 81 M.C.C. 793, 795, the Commission, division 1 concluded that applicant

> does not propose a new operation, but desires to continue his long-conducted service. While the past operation, standing alone, is not controlling of the issues before us, it may be considered along with other evidence to determine whether the proposed

> service is required by the public. The shipper has satisfactorily used applicant's service and desires its continuance. • • • We think that applicant has demonstrated a need for the service • • • and that such service would not create a new competitive situation to the detriment of protestants.

So it is here. Moreover, Armored Carrier concedes its inability to provide the complete service which is required by the supporting shippers. Obviously, in these circumstances, a grant of authority would be of no material consequence to Armored Carrier's existing operations. There remains the issue of fitness.

The period of time involved in the questioned operations, 4 years, should not be the controlling consideration. *Central Wisconsin Motor Transport* v. *Steel Transp. Co.*, 98 M.C.C. 232. Sound economic regulation must assure shippers of a system of motor carriage by which their reasonable transportation requirements may be met. Cf. *United States* v. *Drum*, 368 U. S. 370, 374 (1962).

Past unauthorized operations do not necessarily act as a bar to a grant of authority to perform a needed service. *McLaughlin Common Carrier Application*, 73 M.C.C. 318, 320; *Ratliff & Ratliff, Inc. Extension—Florida*, 73 M.C.C. 181, 184; *Cullum Extension— Ohio*, 67 M.C.C. 5. In *Paladino Common Carrier Application*, 76 M.C.C. 581, 583, the Commission, division 1, observed that—

> [applicant] has been serving the public • • • [for 14 years] and we do not believe it would be in the public interest • • • to force him out of business.

In the *McLaughlin* case, *supra*, page 320, the Commission, division 1, said that—

> applicant's past record leaves a great deal to be desired. • • • [but] the record establishes • • •

applicant's resolve in the future to live within the letter and the spirit of the law.

In the *Central Wisconsin Motor Transport* case, *supra*, the Commission, division 1, concluded that—

> The application as filed indicates clearly that the purpose of this proceeding is to enable applicant to perform a complete service * * *. This is manifested by the showing here made that STC *for many years without question as to its lawfulness* has rendered its shipping public such a complete service, and that the shipping public has a need therefor. 98 M.C.C., 232, 241.

While we do not condone applicant's past unauthorized operations, we conclude that the evidence as to these operations does not require a finding of unfitness. *Sears Contract Carrier Application*, 92 M.C.C. 602, 604; *Garrison Fast Freight Inc., Common Carrier Application*, 67 M.C.C. 550, 551.

Under the circumstances, however, B.D.C. is admonished that it is expected to conduct future operations in accordance with the act and our rules and regulations thereunder.

In No. MC-C-3480 we find that defendant for 4 years prior to December 6, 1961, without appropriate operating authority from this Commission, has engaged in the transportation, in interstate or foreign commerce, of cash letters between Chicago, Ill., on the one hand, and, on the other, points in five Wisconsin counties, in violation of sections 203 and 206 of the Interstate Commerce Act; that since December 6, 1961, defendant has held temporary authority to conduct the operations complained of; and in

view of our conclusions in No. MC-114533 (Sub-No. 32), the proceeding should be dismissed.

In No. MC-114533 (Sub-No. 32) we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of commercial papers, documents, and written instruments (except coins, currency, and negotiable securities) as are used in the conduct and operation of banks and banking institutions, between Chicago, Ill., on the one hand, and, on the other, points in Walworth, Jefferson, Dodge, Columbia, and Kenosha Counties, Wis., that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act, and the rules and regulations of the Commission thereunder; and that a certificate should be issued.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, within the time specified in the order entered concurrently herein, an appropriate certificate in No. MC-114533 (Sub-No. 32) will be issued. An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting:

In my opinion, the unlawful operations of this applicant to and from points in Walworth, Jefferson, Dodge, and Columbia Counties can only be viewed as knowing and willful violations of the act. Neither the fact that temporary authority was issued allowing the applicant to continue these operations pending disposition of these proceedings nor the desire of shippers for continuance of this service relieves us of the responsibility of determining applicant's fitness. Compare *Antietam Transit Co.*,

Inc., Common Carrier Application, 84 M.C.C. 459, 461. I, therefore, would deny the application on the ground that applicant is unfit to receive a grant of authority.

Appendix

Authority sought in the application.—By application filed December 1, 1961, B.D.C. Corporation, of Chicago, Ill., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of commercial papers, documents, and written instruments (except coins, currency, and negotiable securities) as are used in the conduct and operation of banks and banking institutions, between Chicago, Ill., on the one hand, and, on the other, points in Walworth, Jefferson, Dodge, Columbia, and Kenosha Counties, Wis.

The complaint.—By complaint filed November 27, 1961, Armored Carrier Corporation, of Bayside, N. Y., alleges that defendant, B.D.C. Corporation of Chicago, Ill., willfully and knowingly was conducting unauthorized operations in interstate or foreign commerce as a for-hire carrier in the transportation of cash letters between Chicago, Ill., on the one hand, and, on the other, points in Walworth, Jefferson, Dodge, Columbia, and Kenosha Counties, Wis., in violation of sections 213, 206, 209, 210, 216, and 218 of the Interstate Commerce Act; and that such unlawful operations have proved detrimental to the motor carrier business of complainant.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 30th day of June A. D. 1965.

No. MC-114533 (Sub-No. 32)

B.D.C. CORPORATION, EXTENSION—FIVE COUNTIES

No. MC-C-3480

ARMORED CARRIER CORPORATION

v.

B.D.C. CORPORATION

These proceedings having been duly instituted and full investigation of the matters and things involved having been made, and the said division on the date hereof having made and filed a report herein containing its findings of fact and conclusions thereon which report is hereby referred to and made a part hereof:

IT IS ORDERED, That the proceeding in No. MC-C-3480 be, and it is hereby, dismissed.

IT IS FURTHER ORDERED, In No. MC-114533 (Sub-No. 32) that unless compliance is made by applicant with the requirements of Sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)